No. 48753-5-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

TEHL DUNLAP,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

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Respondent's Brief

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II. STATEMENT OF THE CASE

Janeal Thompson and Tehl Dunlap have known each other for a number of years, but began a dating relationship sometime in the 2013. RP[1] 99-101. Ms. Thompson and Dunlap had an on-again and off-again relationship throughout 2014 and 2015. RP 99, 102. Dunlap was jealous and insecure. RP 102. Dunlap always thought Ms. Thompson was texting other men and accused her of sleeping with other people. RP 102.

[1] The trial is two consecutively paginated volumes which the State will cite as RP. Another verbatim report of proceedings the State will cite to the date of the proceedings.

On September 27, 2015, Ms. Thompson got together with Aaron Malone,[2] whom Ms. Thompson considered her brother even though they were not related by blood. RP 96-97. Ms. Thompson had not seen Mr. Malone in some time. RP 97. Ms. Thompson and Mr. Malone went horseback riding. RP 97. While horseback riding, Ms. Thompson began to receive text messages from Dunlap. RP 98, 103. Dunlap asked Ms. Thompson to go have a drink with him, she declined, explaining she was spending the day with her brother. RP 104. Dunlap accused Ms. Thompson of lying, that she was "fucking her brother." RP 104. Ms. Thompson denied having a sexual relationship with Mr. Malone. RP 104.

After horseback riding, Mr. Malone and Ms. Thompson decided to go down to Frank's Bar in downtown Winlock to go hang out. RP 98. Mr. Malone took the phone from Ms. Thompson and began to text back and forth with Dunlap up until the point when Mr. Malone and Ms. Thompson got to the bar. RP 105. Ms. Thompson and Mr. Malone arrived at the bar, ordered drinks, and played pool and darts. RP 108, 214-15.

[2] As Appellant noted in his briefing, Mr. Malone is only called Aaron during the actual testimony, but his last name was stated by the deputy prosecutor during the opening statement.

Dunlap showed up at the bar. RP 109, 218. Ms. Thompson was already drunk. RP 109. Dunlap walked into the bar and straight up to Mr. Malone. RP 110. Mr. Malone and Dunlap had a conversation, Lisa Dorn, the bartender, asked them to take it out back. RP 111, 219.

Mr. Malone and Dunlap went outside and things escalated. RP 111. Dunlap was saying to Mr. Malone, "I know you're fucking her. She's a lying piece of shit." RP 112. Mr. Malone explained he had been dealing with a drug problem, had stayed away from Ms. Thompson, and that was why Dunlap had never heard of him before. RP 112. Dunlap called Mr. Malone a "bitch." RP 113. Mr. Malone stood up and was about to hit Dunlap. RP 113. Ms. Dorn stepped in, said she had enough, and she was calling the police. RP 113, 219.

Mr. Malone went and retrieved his stuff out of Ms. Thompson's truck, told her to stay and sober up, and started walking. RP 113. Ms. Thompson was furious at Mr. Malone for leaving her. RP 113. Ten to 15 minutes after Mr. Malone left Dunlap came back to the bar. RP 116, 222. Dunlap sat down and tried to talk to Ms. Thompson. RP 116. Ms. Thompson told Dunlap to leave her alone, she was angry with him. RP 117. Dunlap said he was sorry and offered her a ride and to go find Mr. Malone. RP 117. Ms. Thompson knew she was

too drunk to drive and she wanted to find Mr. Malone, so she agreed to let Dunlap give her a ride. RP 117, 222-23.

Dunlap went to the gas station first and Ms. Thompson gave him 10 dollars for gas for his truck. RP 125, 306. Ms. Thompson was specific about the two places, both trailer parks, in Winlock where she wanted to look for Mr. Malone. RP 121, 126. Dunlap made a right hand turn out of the gas station parking lot. RP 126. Dunlap headed the wrong way, and Ms. Thompson asked Dunlap where they were going. RP 127.

Dunlap then turned towards the park and Ms. Thompson believed they were going to the park. RP 127-29. But then Dunlap drove straight instead of turning towards the park and drove up the hill, not saying anything with a smile on his face. RP 129. Ms. Thompson again asked Dunlap where they were going. RP 129. Dunlap did not answer, he just smiled. RP 129.

While they were driving Ms. Thompson was on her phone, looking for a text message. RP 129. Dunlap stopped the truck in the middle of the road. RP 129. Dunlap ripped Ms. Thompson's phone out of her hands. RP 129. Dunlap started going through Ms. Thompson's phone, stating she was a lying bitch and he was going to find out. RP 129. Ms. Thompson attempted to grab her phone

several times. RP 130. Dunlap then threw the phone out the window and purposely ran it over. RP 130.

Ms. Thompson threw Dunlap's shotgun out the passenger side door. RP 131. Dunlap grabbed Ms. Thompson by the hair, ripped her head down and told her to "get his fucking gun." RP 132. Ms. Thompson retrieved Dunlap's shotgun. RP 132. Ms. Thompson was drunk, upset, and crying. RP 133-34. Dunlap was swearing at Ms. Thompson, calling her "a lying bitch, a whore, a slut…." RP 134.

Ms. Thompson lit a cigarette and Dunlap told her she was not allowed to smoke in his truck. RP 135. Dunlap then put Ms. Thompson's cigarette out on her chest. RP 135.

Ms. Thompson tried to grab the keys out of the ignition. RP 136. Ms. Thompson then tried to grab the steering wheel and steer the truck into the ditch so she could get out. RP 136. Dunlap attempted to break her arm. RP 136. Dunlap then tried to push Ms. Thompson out of the truck. RP 138. According to Ms. Thompson, the truck was going 50 to 60 miles per hour down the road, too fast for her to risk jumping out. RP 143.

Dunlap eventually drove Ms. Thomson back to her truck at the bar. RP 150. Ms. Thompson told Dunlap she was going to call the police and then began to pick up items off the floor of the truck and

throw them onto the ground outside. RP 151. Ms. Thompson threw the items outside because she wanted to get the license plate of the truck and thought if Dunlap had to pick the items up it would delay him from leaving. RP 151. Dunlap grabbed Ms. Thompson's hair, ripped her head into the seat, and stated, "Don't fucking throw anything else out of my goddamn truck." RP 151.

It was approximately an hour to an hour and a half later from the time Dunlap and Ms. Thompson had left the bar until Ms. Thompson was returned to the bar. RP 224-25. Ms. Thompson came into the bar screaming, "Call 9-1-1." RP 225. Ms. Thompson told Ms. Dorn, "'He assaulted me,' or 'He attacked me,' or something like that." RP 225. Ms. Thompson was hysterical, she was having trouble breathing, she was screaming, and crying. RP 226.

The State charged Dunlap by Second Amended Information with Count I: Kidnapping in the First Degree, Count II: Assault in the Fourth Degree, Count III: Unlawful Imprisonment, Count IV: Malicious Mischief in the Third Degree. CP 11-13. All counts carried an allegation that they were committed against a family or household member. *Id.* Prior to trial Dunlap's attorney filed an Affidavit of Prejudice against Judge Hunt. CP 6. Judge Hunt found the affidavit of prejudice was not timely because he had already made a

discretionary decision on the case. RP (11/5/15) 2.[3] Dunlap also attempted, unsuccessfully, to have Judge Hunt recuse himself for actual prejudice. RP (11/5/15) 3-4.

Dunlap elected to have his case tried to a jury. See RP. The jury convicted Dunlap of Counts II and III, Assault in the Fourth Degree and Unlawful Imprisonment. CP 45-46. The jury also found the crimes were committed against a family or household member. CP 48. The jury acquitted Dunlap on Counts I and IV, Kidnapping and Malicious Mischief in the Third Degree. CP 44, 47. The trial court sentenced Dunlap to 6 months on Count III and 364 days with 359 suspended for 24 months on Count II. CP 52. Dunlap timely appeals his convictions. CP 60.

The State will supplement the facts as necessary throughout its argument below.

III. ARGUMENT

A. THE AFFIDAVIT OF PREJUDICE WAS NOT TIMELY BECAUSE JUDGE HUNT HAD ALREADY MADE A DISCRETIONARY RULING IN DUNLAP'S CASE.

Dunlap argues his affidavit of prejudice, pursuant to RCW 4.12.050(1), was improperly denied because the trial judge had not

[3] This volume of proceedings has the hearings that took place on 11/5/15 and 11/12/15. The State will cite to the RP with the 11/5/15 date.

made a discretionary ruling in his case. Brief of Appellant 9-14. The trial judge did make a discretionary ruling in Dunlap's case and therefore correctly denied the affidavit of prejudice. This Court should affirm Dunlap's convictions.

1. Standard Of Review.

Questions of statutory interpretation are reviewed de novo. *State v. Tarabochia*, 150 Wn.2d 59, 63, 74 P.3d 642 (2003). "If the statute's meaning is plain on its face, we must give effect to that plain meaning as an expression of legislative intent. "*Tarabochia*, 150 Wn.2d at 63 (internal quotations and citations omitted). Statutes that are unambiguous "should not be subjected to judicial construction." *Id.*

2. Judge Hunt's Determination Of Dunlap's Motion For Public Funds For An Investigator Was A Discretionary Decision, Therefore, Dunlap's Affidavit Of Prejudice Was Not Timely.

The legislature gave parties a tool, in superior court cases, by which they are able to remove one judge from their case by right, prior to that judge making a discretionary decision. RCW 4.12.040; RCW 4.12.050; *State v. Dennison*, 115 Wn.2d 609, 619, 801 P.2d 193 (1990). "No judge of a superior court of the State of Washington shall sit to hear or try any action or proceeding when it shall be established as hereinafter provided that said judge is prejudiced

against party or attorney…" RCW 4.12.040(1). If an attorney complies with the statutory requirements, RCW 4.12.040 is mandatory and nondiscretionary. *Dennison*, 115 Wn.2d at 619. The procedure is as follows:

> Any party to or any attorney appearing in any action or proceeding in a superior court, may establish such prejudice by motion, supported by affidavit that the judge before whom the action is pending is prejudiced against such party or attorney, so that such party or attorney cannot, or believes that he or she cannot, have a fair and impartial trial before such judge: PROVIDED, That such motion and affidavit is filed and called to the attention of the judge before he or she shall have made any ruling whatsoever in the case, either on the motion of the party making the affidavit, or on the motion of any other party to the action, of the hearing of which the party making the affidavit has been given notice, and before the judge presiding has made any order or ruling involving discretion, but the arrangement of the calendar, the setting of an action, motion or proceeding down for hearing or trial, the arraignment of the accused in a criminal action or the fixing of bail, shall not be construed as a ruling or order involving discretion within the meaning of this proviso; and in any event, in counties where there is but one resident judge, such motion and affidavit shall be filed not later than the day on which the case is called to be set for trial: AND PROVIDED FURTHER, That notwithstanding the filing of such motion and affidavit, if the parties shall, by stipulation in writing agree, such judge may hear argument and rule upon any preliminary motions, demurrers, or other matter thereafter presented: AND PROVIDED FURTHER, That no party or attorney shall be permitted to make more than one such application in any action or proceeding under this section and RCW **4.12.040**.

RCW 4.12.050(1)(emphasis original).

The issue raised by Dunlap revolves around whether Judge Hunt actually made a discretionary decision in Dunlap's case prior to the affidavit of prejudice being filed. Brief of Appellant 11-14. Judge Hunt, when declining to accept the affidavit of prejudice, stated he had made a discretionary ruling when he reviewed Dunlap's motion for an investigator and signed an order approving the request. RP (11/5/15) 2, 5. Dunlap argues that the approval of funds for an investigator is an administrative task. This argument is based on Dunlap's attorney's duty to give effective assistance to his client, and as part of that duty it requires counsel to investigate his or her client's case, or make a determination that such investigation is unnecessary. Brief of Appellant 11, *citing In re Rice,* 118 Wn.2d 876, 889, 828 P.2d 1086 (1992) (others citations omitted).

The act by a judge of reviewing a counsel for an indigent defendant's motion for the allowance of funds to hire an investigator, determining if that request is appropriate under the circumstanced of the defendant's particular case, and signing the order permitting the use of public funds, is an act of discretion. Therefore, Judge Hunt properly ruled that he had already made a ruling involving discretion prior to Dunlap filing his affidavit of prejudice.

There are a number of type of rulings that do not involve discretion, such as case settings and the fixing of bail and arraignments in criminal cases. RCW 4.12.050(1).

> The exercise of discretion is not involved where a certain action or result follows as a matter of right upon a mere request; rather, the court's discretion is invoked only where, in the exercise of that discretion may either grant or deny a party's request.

Rhinehart v. Seattle Times Co., 51 Wn. App. 561, 578, 754 P.2d 1243 (1988), *citing State ex. re. Mead v. Superior Court*, 108 Wash. 636, 185 P. 628 (1919). The decision whether to accept a waiver of jury trial or grant a continuance are examples of discretionary decisions by a judge. *Rhinehart*, 51 Wn, App. at 578 (internal citations omitted).

Defense counsel has an obligation to his or her client to reasonably evaluate the evidence in their case to access the likelihood that the client may be convicted. *State v. A.N.J.*, 168 Wn.2d 91, 111, 225 P.3d 956 (2010). Therefore, to be effective, defense counsel must take steps to investigate their client's case to the extent necessary to provide the client the ability to make a meaningful decision as to whether to take his or her case to trial or plead guilty. *A.N.J.*, 168, Wn.2d at 111-12. The Standards for

Indigent Defense state, "Public defense attorneys shall use investigative services as appropriate." SID 6.1.

"As appropriate" is key to the analysis as to whether Judge Hunt, in reviewing Dunlap's trial counsel's request for public funds to employ an investigator was merely administrative or a discretionary decision. The motion itself states:

> COMES NOW the Defendant, by and through his attorney, Michael J. Underwood, and moves this court for an order authorizing the expenditure of public funds in the amount of $750.00 for James Armstrong to serve as private investigator on the Defendant's behalf. This motion is based on the records and files herein and the declaration attached hereto.

CP 61. The declaration attached states,

> That the defendant is charged with DV Kidnapping 1 and DV Assault 4.
>
> That I need the assistance of a private investigator to locate and interview defense witnesses. This is an incident that began at a bar in Winlock so those at the bar are potential witnesses. I also need his assistance in interviewing any prosecution witnesses as well as the alleged victim.

CP 61-62. The motion itself speaks to discretionary nature of the decision. The judge reviews the motion and the court file prior to determining if the request for funds is proper. See CP 61. Contrary to Dunlap's assertion that there is no declaration filed,[4] the judge is

[4] See Brief of Appellant 13.

also reviewing defense counsel's declaration, which sets forth the reasoning behind the request for the need for expenditure of public funds for the investigator. See CP 61-62. There would be no need to file such a declaration if the judge signing an order allowing the expenditure of public funds for an investigator was merely an administrative act, rubber stamping, so to speak, a request from counsel to get the funds released.

Judge Hunt could have declined to sign Dunlap's request if he found it to not be appropriate. A judge may find such a request not appropriate if, for example, defense counsel requested a sum of money that far exceeded the necessary costs for such a case. Another example could be for the funds for the investigator to travel to a location that was unnecessary given the pending criminal charges and other options for contacting the witnesses.

These types of motions require a judge to evaluate the reasonableness of the request and use their discretion when granting the expenditure of public funds for an investigator for an indigent defendant. Therefore, Judge Hunt's ruling that he had made a discretionary ruling in Dunlap's case, by deciding whether to grant Dunlap's motion for the expenditure of public funds for an investigator, was proper. The denial of granting the affidavit of

prejudice was also proper, and this Court should affirm the ruling and Dunlap's convictions.

B. THE TRIAL COURT DID NOT VIOLATE THE APPEARNCE OF FAIRNESS DOCTRINE.

Dunlap asserts the trial court violated the appearance of fairness doctrine when the trial judge refused to recuse himself after the judge was made aware he represented a client who had assaulted Dunlap. Brief of Appellant 14-17. Dunlap argues due to the appearance that Judge Hunt could not be impartial because of this potential bias he should have recused himself. *Id.* at 17. The appearance of fairness doctrine was not violated and this Court should affirm Dunlap's convictions.

1. Standard Of Review.

The appearance of fairness doctrine and whether a judge should be disqualified based upon if the judge's impartiality may reasonably be questioned is an objective test. *In re Swenson*, 158 Wn. App. 812, 818, 244 P.3d 959 (2010). An appearance of fairness claim will not succeed without evidence of actual or potential bias because the claim would be without merit. *Id.*

2. Judge Hunt Did Not Violate The Appearance Of Fairness Doctrine.

A criminal defendant has a constitutional right to a fair trial by an impartial judge. U.S. Const. amends. VI, XIV; Const. art. I, § 22. The law requires more than just impartiality, the law requires a judge to also appear impartial. *State v. Gamble*, 168 Wn.2d 161, 187, 225 P.3d 973 (2010) (quotations and citations omitted). It is presumed that a judge acts without prejudice or bias. *Swenson*, 158 Wn. App. at 818. Judges are also required to disqualify himself or herself from a proceeding if the judge's impartiality may reasonably be questioned or they are biased against a party. CJC 2.11(A);[5] *Swenson*, 158 Wn. App. at 818. Under the Code of Judicial Conduct:

> A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned including but not limited to the following circumstances:
>
> (1) The judge has a personal bias or prejudice concerning a party or a party's lawyers, or personal knowledge of facts that are in dispute in the proceeding.

CJC 2.11(A)(1).

"The appearance of fairness doctrine is 'directed at the evil of a biased or potentially interested judge or quasi-judicial decision

[5] The State is citing to the current citation under the CJC. Much of the case law cites to former CJC 3(D)(1).

maker.'" *Swenson*, 158 Wn. App. at 818, *citing State v. Post*, 118 Wn.2d 596, 618-19, 826 P.2d 172 (1992). Under the objective standard, "a judicial proceeding is valid only if a reasonably prudent, disinterested observer would conclude that the parties received a fair, impartial and neutral hearing." *Gamble*, 168 Wn.2d at 187 (internal quotations and citations omitted). Allegedly improper or biased comments are considered in context. *See, e.g.*, *Gamble,* 168 Wn.2d at 188; *In re Dependency of O.J.*, 88 Wn. App. 690, 697, 947 P.2d 252 (1997). A defendant who has reason to believe a judge is biased and impartial must affirmatively act if they wish to pursue a claim for violation of the appearance of fairness doctrine. *Swenson*, 158 Wn. App. at 818. A defendant cannot simply wait until he or she has an adverse ruling to move for disqualification of a judge if that defendant has reason to believe the judge should be disqualified. *Id.*

The following exchange occurred at the omnibus hearing:

> MR. UNDERWOOD: Well, I guess I'll re-raise it. I think I already know what your decision is.
>
> I think you're aware that at some point in the past, you represented an individual in a criminal case where my client was the victim, so we'd asked you to consider recusal. And it's my understanding that you declined to recuse yourself on that.
>
> THE COURT: I did decline, yes, I did. But I had to be told who the victim was, and I had to be told when the trial was. So, yeah, that's correct, I did. I don't have any

> recollection of it other than it was a pretty severe case of an assault…
>
> MR. UNDERWOOD: My client advises he believed it was sometime around 2007, 2008.
>
> THE COURT: It wasn't. I was a judge then. It had to have been before 2004, so we're talking easily over 10 years. I've been on the bench for 11 years.

RP (11/5/15) 3-4. Judge Hunt had no independent memory of Dunlap being the victim in a case that he represented the person who assaulted Dunlap until someone notified Judge Hunt of this fact. It is clear from the record that the case was a minimum of 11 years prior to Dunlap's trial and Judge Hunt could not recall the case, except that it was "a pretty severe case of an assault."

There is no actual bias in this case. So the question becomes, is there potential bias, and if so, would a reasonably prudent, disinterested observer conclude that Dunlap could not receive an impartial, neutral, and fair trial from Judge Hunt? *See Gamble,* 168 Wn.2d at 187; *In re Swenson*, 158 Wn.2d at 818. It is difficult to see how there could even be potential bias, when Judge Hunt had no independent recollection of the case in which Dunlap was a victim, minus that it was a pretty severe assault. Judge Hunt did not even recall that Dunlap was the victim in the case until it was brought to his attention.

Arguendo, even with potential bias established, a reasonably prudent, disinterested person who observed the exchange above would conclude that Judge Hunt was fair, impartial, neutral to Dunlap. The fact that Judge Hunt, in his previous occupation, over a decade earlier, represented a person who assaulted Dunlap does not lead to the conclusion that Judge Hunt was unfair or could not be impartial. Judge Hunt was under no duty to recuse himself, as he held no personal bias or prejudice against Dunlap, he did not even recognize or remember Dunlap. Judge Hunts refusal to recuse himself from Dunlap's case was not a violation of Dunlap's right to due process and did not violate the appearance of fairness doctrine. This Court should affirm.

C. DUNLAP CANNOT RAISE THE ISSUE OF THE ALLEGED VIOLATION OF HIS RIGHT TO A UNANIMOUS JURY VERDICT BECAUSE THE ERROR IS NOT MANIFEST.

For the first time on appeal, Dunlap argues that the trial court violated his right to a unanimous jury verdict by failing to give the unanimity instruction for Count II, Assault in the Fourth Degree. Brief of Appellant 17-20. This alleged error presumes that Dunlap's actions were not a continuing course of conduct, making the instruction necessary. The alleged error, while constitutional in

magnitude, was not manifest, as there is no error, and therefore, Dunlap may not raise it for the first time on appeal.

1. Standard Of Review.

A claim of a manifest constitutional error is reviewed de novo. *State v. Edwards*, 169 Wn. App. 561, 566, 280 P.3d 1152 (2012).

2. Dunlap Did Not Request A Unanimity Instruction, Or Raise The Issue Regarding The State's Lack Of Election In The Trial Court, Therefore, Dunlap Must Demonstrate That The Error Is A Manifest Constitutional Error.

Dunlap did not raise the unanimity issue at trial. *See* RP. An appellate court generally will not consider an issue that a party raises for the first time on appeal. RAP 2.5(a); *State v. O'Hara*, 167 Wn.2d 91, 97-98, 217 P.3d 756 (2009); *State v. McFarland*, 127 Wn.2d 322, 333-34, 899 P.2d 1251 (1995). The origins of this rule come from the principle that it is the obligation of trial counsel to seek a remedy for errors as they arise. *O'Hara*, 167 Wn.2d at 98. The exception to this rule is "when the claimed error is a manifest error affecting a constitutional right." *Id., citing* RAP 2.5(a). There is a two part test in determining whether the assigned error may be raised for the first time on appeal, "an appellant must demonstrate (1) the error is manifest, and (2) the error is truly of constitutional dimension." *Id.* (*citations omitted)*.

The reviewing court analyzes the alleged error and does not assume it is of constitutional magnitude. *Id.* The alleged error must be assessed to make a determination of whether a constitutional interest is implicated. *Id.* If an alleged error is found to be of constitutional magnitude the reviewing court must then determine whether the alleged error is manifest. *Id.* at 99; *McFarland*, 127 Wn.2d at 333. An error is manifest if the appellant can show actual prejudice. *O'Hara* 167 Wn.2d at 99. The appellant must show that the alleged error had an identifiable and practical consequence in the trial. *Id.* There must be a sufficient record for the reviewing court to determine the merits of the alleged error. *Id. (citations omitted)*. No prejudice is shown if the necessary facts to adjudicate the alleged error are not part of the record on appeal. *McFarland*, 127 Wn.2d at 333. Without prejudice the error is not manifest. *Id*.

Dunlap did not raise any objections or exceptions to the jury instructions given by the trial court. RP 388-89. Dunlap's trial counsel proposed two jury instructions of his own, none of which were an unanimity instruction. CP 14-16. Therefore, Dunlap has the burden of proving the alleged error was of constitutional magnitude and manifest.

a. The alleged error is of constitutional magnitude.

A criminal defendant has the right to have a jury unanimously agree on a verdict finding him or her guilty. *State v. Smith*, 159 Wn.2d 778, 783, 154 P.3d 873 (2007) (citations omitted). This right is guaranteed by the Washington State Constitution. Const. art. I, § 21. If the State presents evidence of multiple distinct acts, any of which could form the basis for the charge, the State must elect which acts it is relying upon for the conviction or the trial court must give an unanimity instruction. *State v. Coleman*, 159 Wn.2d 509, 511, 150 P.3d 1126 (2007). The unanimity instruction ensures the jury is unanimous in the act it finds the State proved beyond a reasonable doubt to convict the defendant. *Coleman*, 159 Wn.2d at 511-12. Therefore, the alleged error, a non-unanimous verdict, is of constitutional magnitude. Dunlap still must show that the error was manifest. *State v. Knutz*, 161 Wn. App. 395, 406-07, 253 P.3d 437 (2011).

b. The alleged error is not manifest because no error occurred and therefore, Dunlap was not prejudiced.

Dunlap cannot meet the necessary burden of showing his alleged error, an alleged non-unanimous verdict, actually prejudiced him. An error is manifest if a defendant can show actual prejudice.

State v. Gordon, 172 Wn.2d 671, 676, 260 P.3d 884 (2011). Actual prejudice requires a defendant to make a "plausible showing… that the asserted error had practical and identifiable consequences in the trial of the case." *O'Hara*,167 Wn.2d at 99 (internal citations and quotations omitted).

Dunlap argues the State, while charging him with one single count of Assault in the Fourth Degree, presented multiple acts which constituted potential assaults. Brief of Appellant 19-20. Dunlap also argues he asserted separate defenses for the different assaults, alleging some had not occurred and that others were self-defense. *Id.* at 19-20. Therefore, the State must either elect or present an unanimity instruction, and it did neither. Dunlap's claim fails. Dunlap's multiple assaults on Ms. Thompson were a continuing course of conduct, and the State was not required to elect or present an unanimity instruction.

This Court views the facts of a case in a commonsense matter when it determines if multiple acts form one continuing offense. *State v. Rodriguez*, 187 Wn. App. 922, 937, 352 P.3d 200 (2015), *citing State v. Petrich*, 101 Wn.2d 566, 571, 683 P.2d 173 (1984). "Evidence that multiple acts were intended to secure the same

objective supports a finding that the defendant's conduct was a continuing course of conduct." *Rodriquez*, 187 Wn. App. at 937.

Continuing course of conduct has been found in cases where there was one victim and multiple acts of a singularly charged crime was committed over a short period of time. *State v. Locke*, 175 Wn. App. 779, 782-83, 307 P.3d 771 (2013). A short period of time does not mean only mere minutes. For example, in *State v. Crane*, the Supreme Court found Crane's actions of multiple assaults on a three-year old over the course of two hours, which resulted in the child's death, constituted a continuing course of conduct, and no unanimity instruction was required. *State v. Crane,* 116 Wn.2d 315, 330-31, 804 P.2d 10 (1991).

Assault, therefore, "can be a continuing course of conduct crime." *Rodriquez*, 187 Wn. App. at 937. In *Rodriquez*, the victim was struck and strangled several times within seconds of each other. *Id.* at 926-27. Rodriquez told the victim he was going to kick her ass, and "fuck her up" repeatedly. *Id.* The Court found this was a continuing course of conduct, as it was the same victim, done within a short amount of time, and done for a singular purpose (because Rodriquez wanted to beat her up). *Id.* at 937. No unanimity instruction was required. *Id.* at 938.

In *Locke*, a series of electronic communications, two emails and an event request form, were sent within four minutes by Locke to Governor Gregoire. *Locke*, 175 Wn. App. at 785-86. In the first email, Locke told the Governor he hoped she had "an opportunity to see one of her family members raped and murdered by a sexual predator." *Id.* at 785. In the second email, Locke told the Governor she "should be burned at the stake like any heretic." *Id.* The event request Locke filled out was for a public execution of the Governor. *Id.* at 786. The Court found these communications were a continuous course of conduct, as they were close in time and served the same objective, communicating Locke's desire that Governor Gregoire and/or her family be harmed or killed. *Id.* at 803. Therefore, there was no requirement for an unanimity instruction and the claim was not a manifest constitutional claim which could be raised for the first time on appeal. *Id.* at 803-04.

The *Locke* Court also noted that in another case, a defendant who made statements to two people over the course of 90 minutes had engaged in a continuous course of conduct for the purpose of the crime of intimidating a witness. *Id.* at 803, *citing State v. Marko*, 107 Wn. App. 215, 221, 27 P.3d 228 (2001). In *Marko*, the defendant, who was being detained after attempting to rob a gas station,

threatened the two store owners over the period of 90 minutes while they waited for the police to arrive. *Marko*, 107 Wn. App. at 216-17. Marko told the owners he, or his friends, would come back to the gas station and blow it up, he would sue them, and that he would get even. *Id.* at 217. Marko repeatedly asked the owners to be released. *Id.* There was no unanimity instruction required for the two counts of intimidating a witness. *Id.* at 221.

Dunlap was extremely jealous and angry because he believed Ms. Thompson was lying to him and sleeping with other men. RP 102, 104, 112, 129, 134, 136, 228-29, 236, 335. Dunlap believed Ms. Thompson was out with a man, Mr. Malone, whom she was in a sexual relationship with. RP 104, 236. After running Mr. Malone off, Dunlap came back to the bar and attempted to get back into Ms. Thompson's good graces. RP 113-17, 223. Dunlap tricked Ms. Thompson into getting into his truck by telling Ms. Thompson he would assist her in locating Mr. Malone. RP 117, 223.

Once in Dunlap's truck it was clear he was not interested in finding Mr. Malone. RP 126-29. Dunlap's jealousy, anger, and rage was taken out on Ms. Thompson once he had her alone in that truck. RP 129-43. Dunlap used physical force, assaulting Ms. Thompson, to get his way and inflict pain upon Ms. Thompson. RP 132, 135,

136, 138, 143, 151. Ms. Thompson is crying. RP 133-34. Dunlap is calling Ms. Thompson, "a lying bitch, a whore, a slut…" RP 134. Dunlap grabs Ms. Thompson by the hair to get her to pick up his shotgun. RP 132. Dunlap puts a cigarette out on Ms. Thompson's chest because he is not going to let her smoke in his truck, even though he smokes. RP 135, 137. Dunlap grabbed Ms. Thompson's arm and twisted it to inflict pain after she grabbed the steering wheel. RP 139-40. Dunlap then tried to push Ms. Thompson out of the truck while it was traveling at approximately 50 miles per hour. RP 138, 143. Then, when Dunlap drives Ms. Thompson back to her truck and she throws some items from his truck out onto the ground, Dunlap again to assert control and get his way, grabs Ms. Thompson by the hair, ripped her head to the seat, and stated, "Don't fucking throw anything else out of my goddamn truck." RP 151.

These multiple incidents of assault occurred over the period of approximately an hour. RP 224-25. The assaults were all committed against the same person, Ms. Thompson. The assaults all served the same objective, for Dunlap to impose his will over Ms. Thompson and to punish her for her lying, cheating ways. These actions were part of a continuous course of conduct and did not require an unanimity instruction. Therefore, Dunlap has not shown

the alleged error is manifest because there was no error, and he cannot raise this issue for the first time on appeal. This Court should affirm Dunlap's Assault in the Fourth Degree conviction.

c. If it was error to fail to give an unanimity instruction, it was harmless beyond a reasonable doubt.

While not conceding any error occurred, arguendo, if it was error to not include an unanimity instruction, any error is harmless beyond a reasonable doubt. To be harmless beyond a reasonable doubt the State must show, "no rational juror could have a reasonable doubt as to any of the incidents alleged." *Coleman*, 159 Wn.2d at 512. Ms. Thompson's testimony about all the incidents was clear. The jury obviously rejected Dunlap's self-defense claim. Dunlap and Ms. Thompson testified somewhat consistently in regards to the incidents that occurred in the truck and the jury was instructed on self-defense, but rejected that claim. RP 316-19, 323-24; CP 29. No rational juror would have had a reasonable doubt that Dunlap had not assaulted Ms. Thompson on each of the incidents alleged by the State throughout the truck ride and return to the parking lot of the bar. Any error is harmless beyond a reasonable doubt and the Assault in the Fourth Degree conviction should be affirmed.

D. DUNLAP'S ISSUE REGARDING APPELLATE COSTS IS MOOT WITH THE COURT'S AMENDEMENT OF RAP 14.2 .

Dunlap argues this Court should not impose appellate costs if the State prevails. This issue has been mooted by the amendment of RAP 14.2, as Wing was found indigent for purposes of this appeal, and the State has no evidence that her circumstances have changed. *See* RAP 14.2; CP 67-68. The State does not know how it will ever meet RAP 14.2's burden to show by a "preponderance of the evidence that the offender's financial circumstances have significantly improved since the last determination of indigency." The State has no ability to require an appellant to provide current financial information. RAP 14.2 guarantees there will be no appellate costs imposed upon Dunlap in this case if the State is the prevailing party.

IV. CONCLUSION

Dunlap's affidavit of prejudice was not timely, as Judge Hunt had already made a discretionary decision in Dunlap's case. Therefore, Judge Hunt's denial of the affidavit of prejudice was proper. There was no violation of the appearance of fairness doctrine because Judge Hunt did not display even potential bias against Dunlap. The multiple assaults Dunlap inflicted against the victim were part of a continuous course of conduct, and therefore, no unanimity instruction or election by the State was required. The State

will not be seeking appellate costs pursuant to the recently amended RAP 14.2. This Court should affirm Dunlap's convictions.

RESPECTFULLY submitted this 3rd day of February, 2017.

JONATHAN L. MEYER
Lewis County Prosecuting Attorney

by:_____
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Attorney for Plaintiff

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent, vs. TEHL DUNLAP, Appellant.	No. 48753-5-II DECLARATION OF SERVICE

Ms. Teri Bryant, paralegal for Sara I. Beigh, Senior Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On February 3, 2017, the appellant was served with a copy of the **Respondent's Brief** by email via the COA electronic filing portal to Travis Stearns, Washington Appellate Project, attorney for appellant, at the following email addresses: wapofficemail@washapp.org and travis@washapp.org.

DATED this 3rd day of February, 2017, at Chehalis, Washington.

Teri Bryant, Paralegal
Lewis County Prosecuting Attorney Office

LEWIS COUNTY PROSECUTOR

February 03, 2017 - 4:09 PM

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